IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 928

RICHWOOD CLOTHESPIN & DISH WORKERS' UNION,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Richwood Clothespin & Dish Workers' Union, petitioner in the above styled proceeding, prays that a writ of certiorari issue to review the decision and decree [1] of the United States Circuit Court of Appeals for the Fourth Circuit entered on February 3, 1944, enforcing an order issued by

[1] The decision and decree were entered in two proceedings:
(1) Case No. 5135, instituted by the Wallace Corporation.
(2) Case No. 5163, instituted by petitioner, herein sometimes called Independent.

National Labor Relations Board and ordering that petitioner abide by and perform the Board's directions contained in the order. [2] A rehearing of the cause, timely filed in said Circuit Court of Appeals, was denied on March 13, 1944.

OPINION BELOW

The opinion of the Circuit Court of Appeals is reported in ..... F. (2) ..... The findings of fact, conclusions of law and order of the Board (T. R. 1-33) [3] are reported in 50 N. L. R. B. 138.

JURISDICTION

The decree of the Circuit Court of Appeals was entered on February 3, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 10 (e) and (f) of the National Labor Relations Act (hereinafter called the Act).

QUESTIONS PRESENTED

1. In September, 1941, a strike was called at The Wallace Corporation's plant at Richwood, West Virginia, by the CIO Union. In October, 1941, the Independent was organized and sought and was denied recognition as the exclusive collective bargaining agency. The CIO filed charges with

[2] A stipulation has been filed regarding the printed record for purposes of the petition for writ of certiorari.

[3] "Tr." refers to the typewritten transcript of the testimony on file with the Clerk of this Court; "R." refers to "Transcript of Record" printed and filed.

the Board of employer's sponsorship of Independent. On January 13, 1942, the employer and the two competing labor unions entered into a written agreement wherein it was agreed that work should be resumed pending an election by the Board to determine which union represented a majority; and upon CIO's insistence, first, for a closed shop, and, then, for a union shop, the employer agreed that "if either union is proven to represent a majority * * * it will recognize a Union Shop * * *." On January 19, the two unions entered into an agreement for consent election, and also an agreement whereby CIO requested withdrawal of its charge of unfair labor practices, both of which were approved by the Board's regional director; the election was conducted by the Board, in which Independent received more than a majority of the votes cast, and no objection being made to the conduct of the election, the Independent was certified to have been selected as the exclusive bargaining agency. Thereafter, the business agent for the Independent demanded of employer a closed-shop agreement as a means of disposing of "any present employees * * * whose presence in the plant is unfavorable to our interests, because those who are so unfavorable will not be permitted to become members of our organization and without such membership they would not be permitted to work under a closed-shop contract * * *." Thereafter, on March 7, 1942, the employer and Independent agreed upon a contract containing, not a closed shop clause, but a union shop provision in accordance with the tripartite agreement of January 13, requiring Independent membership as a condition of employment. Thirty-one employees sought but were denied Independent membership and were laid off. Twelve others were laid off who did not apply for membership. The Board then issued its complaint, alleging the employer had violated the Act, charging the contract was

illegal and void since it was made with a labor organization assisted by unfair labor practices. One question presented is whether, as the Board determined, and the lower Court approved, the contract falls outside the proviso to Section 8 (3) of the Act and therefore affords no protection to the lay off of the employees as aforesaid. Petitioner asserts the lower Court erred in so holding.

2. Whether, as Petitioner contends, the lower Court erred in holding that the Board may re-open and vitiate a strike settlement agreement, set aside an election conducted by it and its certification thereon, and vitiate a working agreement entered into pursuant thereto, where there is no showing of fraudulent conduct, imposition on the Board, or violation of the settlement agreement by the parties to the working agreement and in holding that the Board may consider events antedating the settlement agreements.

3. Whether, as Petitioner contends, the lower Court erred in holding that the Board was warranted in finding that the employer dominated and interfered with the formation and administration of Independent and contributed support to it.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act are set forth in the Appendix.

STATEMENT

On June 7, 1943, the Board issued its Decision and Order (T. R. 1-33), wherein it found that the employer had dominated and interfered with the formation and administration of, and contributed support to this petitioner; that

the contract of March 7, 1942, "falls outside the proviso to Section 8 (3) of the Act" and ordered employer to cease giving effect to the contract; ordered reinstatement of forty-three employees to their former or substantially equivalent positions and ordered the disestablishment of this petitioner as the bargaining representative of any of the employees of said employer for purposes of collective bargaining.

Petitioner filed in the court below a petition to review and set aside the Board's order. The Board answered, requesting enforcement of its order. On February 3, 1944, the Court filed its opinion, and decreed enforcement of the Board's order. The Court held further that the Board, in effect, could consider the events as antedating the settlement agreements of January 13 and 19.

The facts as they concern the respective issues are as follows:

1. *Facts relating to the contract of March 7, 1942.*

During the summer of 1941, Local Union 129, United Construction Workers Organizing Committee (hereinafter called "Union" or "CIO") instituted an organizational campaign among the employees of The Wallace Corporation (hereinafter called "employer") at its Richwood, West Virginia, plant. About the middle of September, 1941, it demanded recognition as the exclusive collective bargaining agency for the employees. The Union refused to adopt any of the three methods offered by the employer for determining whether Union had a majority; and on September 25, the Union called a strike at the Richwood operation.

In October, 1941, a group of employees organized the

Independent, and on the 14th day of that month requested employer recognition of it as the collective bargaining agent for the employees. This request was denied. Meanwhile Union had filed charges of unfair labor practices against employer. Despite the fact that Independent had filed with the Board a petition for certification, on November 3, 1941, employer's president and vice president and treasurer, met with a representative of the Board in Richwood to which the Board's representative refused to invite Independent representatives. (Tr., 920-972). Board representative had talked with Union people and "some of our employees" and had concluded that Independent was company dominated and proposed an election on condition that Independent would be "out of the picture." (Tr. 919-920). On February 12, 1942, Wallace invited all employees to return to work. The following day, the employer and the two labor organizations met and signed an agreement which provided, in part, for the immediate resumption of operations at the plant, for the conduct of a Board election to determine which, if either union, should be certified, and further that

> "The company further agrees that if either union is proven to represent a majority of its employees by said vote, it will recognize a Union Shop, providing that the Company shall at all times retain the right to suspend, hire or discharge any employee for proper and just cause."

Union representatives had contended for a closed shop (Tr. 959) and the union-shop provision resulted from the insistence of Union representative Fatmer. (Tr., 978).

On January 19, 1942, the same parties entered into two additional agreements: (1) providing for the settlement

and withdrawal of the pending charges of unfair labor practices; and (2) designating both labor organizations as candidates in an election to be held on January 30, 1942. These agreements were approved by the Board's Regional Director, and the case involving the charges of unfair labor practices was closed.

In the election of January 30, conducted by the Board, a majority of the employees selected Independent. No objections were filed to the conduct of the election and the Board certified the Independent as the exclusive bargaining representative of the employees at the Richwood plant.

Following certification, the employer and Independent entered into negotiations for a working agreement. Under date of February 28, 1942, B. E. Thompson, business agent for the Independent, directed a letter to employer's vice president and treasurer wherein he insisted upon a closed shop, stating in part, that

> "The closed shop will, therefore, give us some control in preventing the hiring of additional employees who are unfavorable to our interests and who would further jeapordize our majority. It would also provide us with a legal means of disposing of any present employees, including Harvey Dodrill, whom our members have declared by unanimous ballots that they will not work with, whose presence in the plant is unfavorable to our interests because those who are so unfavorable will not be permitted to become members of our organization and without such membership they would not be permitted to work in the plant under a closed shop contract. * * *."

Inclusion of a closed shop clause in the first draft of the

agreement (Tr., 954) was opposed by the employer. Thompson testified he had harsh words with both Davis, employer's manager, and Wallace about the provisions, and the contract dated March 7, 1942, contained, not a closed shop provision but a union-shop clause instead, and provided that all present and future employees eligible for membership "shall become members" of Independent within ten days from the date of the contract or date of hiring, as the case might be. On March 7, the contract was posted in employer's plant; and on March 16, employer posted another notice that pursuant to the contract, only members in good standing in the Independent could continue to be employed on and after March 18, 1942. On that date forty-three employees were laid off. Of that number twelve did not apply for membership in Independent. The remaining thirty-one applied for membership therein but "their applications were voted upon by members of said organization in the regular manner as provided by the constitution and by-laws of said organization but said applications did not receive the required number of votes to permit them to become members therein." (Tr., p. 254, 255, 264, 265, T. R. 122).

The employer undertook to have Independent take such steps as were necessary to put back to work those employees so laid off. Independent refused; and the complaint, which is the basis of this proceeding, followed.

2. *Facts relating to issue whether the employer had dominated and interfered with the formation and administration of, and contributed support to, the Independent.*

According to testimony offered by the Board to substantiate its finding that Independent was company-sponsored

and dominated; a meeting of the employees was scheduled to be held on October 2 at the home of a foreman who, on the night of the meeting, met the employees on a street corner and adjourned the meeting to the home of Mrs. Lundy Groves, an employee; that when the employees assembled at the Groves' home, Mrs. Groves telephoned Mrs. Irene Groves (called Weese in the Board's decision), secretary to employee's plant manager Davis, for assistance in organizing the group as the nucleus of a labor organization; that Weese recommended B. E. Thompson,[1] a local newspaper editor. Thompson denied that Weese communicated with him with reference to the meeting, and stated positively that Weese made no request that he attend it. Thompson, experienced in union affairs and business agent for another independent employee's labor organization in Richwood (T. R. 380) attended the meeting and became, and acted as, Independent's business agent until on May 15, 1942, when he disassociated himself therefrom because a representative of the Board had advised Thompson's employer (Tr. p. 1016) that the Board was going to prefer unfair labor charges against his employer and suggested that Thompson, not only disassociate himself from the Independent but from Richwood as well, and that as a condition of withholding the complaint against Woodyard Publications, Thompson had to be either discharged or transferred to some other location. (Tr. pp. 274, 280; T. R. 126-131).

The testimony of Board's witness, Mrs. Pearl Stewart, typifies the basis employed by the Board to reach its conclusion and to assert its factual finding. She testified (T. R.

[1] The Board's complaint named Thompson as one of the respondents. In its decision and order the complaint was dismissed as to Thompson (T. R. 29).

p. 382, 383) that she and some other girls saw Clark Gibson talking to Independent members on the street and that the girls turned and went to the home of Mrs. Verdie Groves where, admittedly, the first meeting was held; but when the Trial Examiner propounded to her the next question, "Could you overhear anything that was said between them and this Gibson?", she responded, "No, I did not." Mrs. Mabel Hinkel, testified that Mrs. Lundy Groves, after the Independent's meeting had been held, said that such meeting was to be held at Clark Gibson's home but that his house was filled and the meeting had to be held at Mrs. Groves'. Mrs. Hinkel herself had not been at the meeting, had not heard Clark Gibson make any statement concerning the meeting, and simply attempted to mouthpiece Mrs. Lundy Groves purported statement to her.

Carm Reese was selected as president of Independent while he and Lundy Groves became members of the Board of Directors. The Board charged that they, and Aneil Smith, were a part of the management and therefore their conduct was attributable to employer.

All three of these employees were paid on an hourly basis and were without authority to hire and fire and could not discipline other employees. At the time of the strike the sawyer and saw filer, employees in the mill-room, wherein Reese was an oiler, received higher rates of pay than did Reese. Groves' job was to keep the machine in the clothespin department in operation. His job was termed "a setup man" and consisted of "grinding and adjusting cutting knives." If the machine became faulty, the girl operating it had the authority to tell Groves to repair it (T. R. 386, 387), and he, in turn, could direct her to another machine because "It is to their advantage to keep working." After the strike

Groves held the same position he had when the strike was called, and received no pay increases other than general increases (T. R., 387). Ancil Smith is a setup man in the wood dish department. He receives the same pay which another setup man in the same department receives; and neither has any authority (T. R. 388, 389).

Reese, Groves and Smith punch time-clocks. A. F. Davis, employer's manager, testified (T. R., 392) that by reason of seniority Groves "might be regarded as a temporary foreman in the absence of the regular foreman," and the same basis—seniority—results in others being considered as temporary foremen. According to Davis, a CIO leader, Mike Goheen, performed the same kind of work which Groves and Smith performed, except in different departments, and that Goheen received the highest hourly rate of pay in his department. In Footnote 17 of the Board's opinion (T. R., 13), the Board states that "Other employees who belong to the Union (CIO) act as temporary foremen, but, so far as appears, they were only rank and file Union members." Admitting that these three employees had no authority with respect to hiring or discharging employees, the Board nevertheless found that they were identified with the management because "The machine operators regarded them as assistant bosses or assistant foremen." Footnote 17 Board's Decision and Order (T. R., 13).

REASONS FOR GRANTING THE WRIT

The first two of the issues presented under the heading "Questions Presented" involve questions which, to the present time, have not been the subject of written decision by this Court and are of substantial public importance.

I.

The first question presented is whether the contract of March 7, 1942, falls outside the proviso of section 8(3) of the Act. Upon passage of the Act, as now, the right of labor unions to determine the constituency of its membership had judicial approval. *Mayer* v. *Journeymen Stonecutters' Assn.*, 47 N. J. Eq. 519, 20 A. 492; *Murphy* v. *Higgins*, 12 N. Y. S. (2) 913; *Miller* v. *Reuhl*, 2 N. Y. S. (2) 394 (1938); *Greenwood* v. *Building Trades Council*, 71 Cal. App. 159, 233 P. 283; 1 Teller, Labor Disputes and Collective Bargaining, 287. The effect of the Board's order and the decision of the lower Court is to circumscribe, if not entirely vitiate, this juridically-sanctioned right which is of vital interest to all labor organizations. [4A]

At the outset, it is noted that the limitations imposed by the Act upon unions in the matter of entering into closed-shop agreements do not include the limitation of membership selection. This is clear from the language of the proviso [5] and from the statements of Senator Wagner both upon introduction of the Act and thereafter. [6] Moreover,

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[4A] The Court's position that there is no Court or Board control over union membership is negatived by imposition of duty upon employer, committed to union shop, to insist upon provisions protective of minority's rights. In practical result, the opinion permits employer control which is violative of the Act, and further, such control is accomplished through Board order and the judicial process enforcing it. Illustrative thereof is instant case.

[5] See Appendix.

[6] "Equally erroneous is the belief that the bill creates a closed shop for all industry. * * * Far from suggesting a change, *it merely preserves the status quo.*" (Italics supplied.) Congressional Record, Vol. 79, pt. 3, p. 2332, 73d Cong., 1st Session. "The virulent propaganda to the effect that this bill encourages the closed shop is outrageous in view of the fact that *in two respects it actually narrows the now existing law.* * * * In the first place, while today an employer may sign a closed-shop contract even with a minority group, the bill provides that he shall be allowed to negotiate such an agreement only with an organization which represents the majority. * * * Secondly, the bill is extremely careful to forestall the makings of closed shop agreements with unions that are interfered with or dominated by the company * * *." Idem, p. 7570.

certification of Independent as the exclusive bargaining agency by the Board, after it had permitted the withdrawal of complaint charges in January, stamped the Independent as a union fulfilling the legal characteristics, set forth in the proviso, of a union with which a closed-shop contract might be consummated. That encroachment upon the hitherto unqualified autonomy of a labor union lies with the legislative branch is reflected by statutory enactments in several of the states, providing against discriminatory rules of admission to unions. See Note, 53 Harvard Law Review, 500, 501; Wisconsin Stat. (1939, c. 57,) § 111.06 (1) (c); Pa. Stat. Ann. (Purdon, tit. 43 §211.6 (1) (c); Kans. Laws (1941) c. 265. Likewise, in *Miller* v. *Reuhl*, supra, the court concluded that the legislature's "failure to do so must be accepted as the present expression of public policy and therefore an indorsement of the view * * * that an applicant for membership cannot force his way into the union against the negative vote of the union." The matter of such policy, the omission of limitation upon the membership selection in the proviso; and the inclusion thereof in state statutes are matters which the lower court's opinion does not discuss.

There is no contention of collusive conduct between employer and Independent in relation to the union shop provision in the contract of March 7. The letter which Thompson wrote to the employer followed the date when the tripartite settlement agreements had been made and the election conducted. The lay-off of the employees which is the basis of this controversy stemmed from the tripartite agreement of January 13 when the obligation of the employer became fixed and required it to provide a union shop. The lower Court fell into error when it stated that the union shop meant

"that the employees of the company would be re-

> quired to become members of the successful union as a condition of retaining their employment, not that the successful union might have discharged from employment those who had been on the opposite side of the dispute even though they were willing to become members, by the simple device of denying them membership"

so far as the negative portion of the definition is concerned. There is nothing in the record which justifies any definition of the term "union shop" than that which is generally accorded it.[7] There is nothing upon which even an inference may be established that either union signatory to the settlement agreement intended that there should be a waiver of its right to determine who should be admitted to membership. The knowledge which came to the employer in Thompson's letter did not alter the situation which existed at the time of the tripartite agreement, because the employer's obligation was fixed and, further, the union's right to exclude existed.

The lower Court stated that the Act was never intended to authorize the majority to discriminate against a minority because of prior union or anti-union activities. The Act, it is submitted, deals with employer discrimination not with union discrimination.

Rutland Court Owners, Inc., 44 N. L. R. B. 587, 46 N. L. R. B. 1040, and *Matter of M. Henri Wines, Ltd.*, 44 N. L. R. B. 1310, relied upon by the Board and the lower Court, are not controlling because, in each, there was lacking the legal obligation of the employer to enter into a contract requiring a provision under which applicants might be rejected. Also lacking was an agreement to which the complaining union

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[7] "Under the union shop non-members can be hired, but to retain employment must become union members after a certain period." How Collective Bargaining Works (Twentieth Century Fund), p. 24, Note 41.

had left its signature and the Board its approval. Moreover, the issues were different from the instant one.

II.

Of public importance, also, is the lower Court's approval of the Board's consideration of the events which occurred prior to the settlement agreements. In fact, the Court's opinion indicates its approval even though the employer's conduct did not constitute an unfair labor practice.

The parties to the settlement agreements in executing them, and the Board in approving them, unquestionably regarded their execution as the settlement of the controversial issues over which there had been disagreement for some time. One of such issues was the charge, made by CIO, that the employer had sponsored the Independent, and in this charge a Board agent lent encouragement. The effect of the lower Court's approval of the Board's review of the issues thus settled is to say that one party to the agreement is bound by the contract only if it is successful in obtaining a majority vote. The Court stressed the point that the Board is required to perform its duty. That requirement is appealing; but since the Board was fully informed it should not now be permitted to assume a position inconsistent with its approval and conduct, particularly where others have acted in reliance thereon. In *Hazel-Atlas Glass Co.* v. *N. L. R. B.*, 127 F. (2) 109 (1942), CCA 4, the Court gave full faith to a settlement agreement and held that violations of the Act which were the subject of the settlement agreement had little significance because of the agreement which had Board approval. In *N. L. R. B.* v. *Appalachian Electric Power Co.*, 140 F. (2) 217 (1944), recognition of Board certification

was required of an employer to avoid "litigious bedlam and judicial chaos." Certainly the Board should be held to its own certifications for the same reason. Agreements between an employer and opposing unions have become an integral part of the Board's procedure for determining bargaining representatives.[8] Litigants before the Board should not be placed in a position where they cannot feel, with security, that there is finality to their agreements. The language of the Court in *N. L. R. B.* v. *Sun Shipping & Dry Dock Co.*, 135 F. (2) 15, CCA 3, is peculiarly appropos in the instant proceeding: "***After all, the fundamental purpose of the Act is to secure to employees entitled to its protection the right to bargain collectively through representatives of their own choosing. Obviously, therefore, once a majority choice has been competently polled and authoritatively certified, it is not to be avoided lightly. Otherwise the employees' right may actually be infringed and the purpose of the Act thereby thwarted."

III.

It is submitted that there is no competent legal testimony to support the conclusion that Gibson, a foreman, associated himself with a group of employees who participated in the formation of Independent. The testimony of Mrs. Stewart (T. R., 382, 383) and the hearsay testimony of Mrs. Hinkel, are substantial to support the Board's finding and does not meet the test of sufficiency of testimony necessary to uphold the Board's finding. *N. L. R. B.* v. *Asheville Hosiery Co.*, 108 F. (2) 288, 292, CCA 4; *Consolidated Edison Co.* v. *N. L. R. B.*, 83 L. ed. 126, 140. In finding that Weese

[8] Eighth Annual Report, N. L. R. B., p. 52.

was identified with management so far as the validity of petitioner is concerned, the Board erred. See *Cupple's Co. Mfgrs. v. N. L. R. B.* 106 F. (2) 100, CCA 8; *N. L. R. B. v. Poultrymen's Service Corp.*, 138 F. (2) 201, CCA 3.

The Board was in error also in holding that the activities of Reese, Groves and Smith in connection with the formation and administration of Independent were attributable to the employer, since there is no evidence that these employees "were emulating the example set by the management." *International Assn. of Machinists v. N. L. R. B.*, 311 U. S. 72. See also *Magnolia Petrolgum Co. v. N. L. R. B.*, 112 F. (2) 515, CCA 5; in which a sub-foreman had been elected a temporary president of an independent union, and his activity was relied upon as one evidential fact to prove company domination and interference. The Court said, "Thus, by its finding, the Board denies to Barton the very right the statute gives him, of action with his fellow-employees for self-organization." See *N. L. R. B. v. Shank Products*, 108 F. (2) 872, CCA 3. The conclusion as to these three employees is likewise contrary to a Board decision involving the Cherry River Boom & Lumber Co. 44 N. L. R. B. 273, in which there was testimony that employees regarded yard graders as "bosses" yet the Board said, "Although several employees who worked as lumber handlers testified that they considered yard graders to be 'bosses' and representatives of the management, the evidence, in our opinion, does not support the finding of the Trial Examiner that they are generally so regarded by respondent's employees."

Attention must be paid to the fact that Independent may not be charged with employer's attitude or alleged anti-union statements by its supervisory employees prior to the organi-

zation of Independent. The lower court's opinion does not take this into consideration.

CONCLUSION.

For the reasons stated, it is respectfully submitted that this petition for writ of certiorari should be granted.

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APPENDIX

National Labor Relations Act (Act of July 5, 1935, ch. 372, 49 Stat. 449).

Rights of Employees

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

* * *

SEC. 8. It shall be unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

(2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it * * *

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization; *Provided*, That nothing in this Act, or in the National Industrial Recovery Act (U. S. C. Supp. VII, title 15, secs. 701-712) as amended from time to time, * * * shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by an action defined in this Act as an unfair

labor practice) to require, as a condition of employment, membership therein, if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective bargaining unit covered by such agreement when made.

* * *

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. * * *

* * *

(c) * * * If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice,***

* * *

(f) * * * the findings of the Board as to the facts, if supported by evidence, shall * * * be conclusive.